No 2791

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, *Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellees.*

BRIEF OF APPELLEES

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, IN REPLY TO PETITIONS FOR REHEARING OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

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MARTIN & CAMERON, Residence Boise, Idaho,
Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.

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BRIEF OF APPELLEES

The main contentions set forth by appellant, Equitable Trust Company, in its petition for rehearing are substantially as follows:

1. That the creditors who intervened in the mortgage foreclosure suit and successfully attacked the mortgage or deed of trust *as to themselves* insofar as the personal property mort-

gaged was concerned, should not have been allowed to intervene and make this attack for the reason that they held no lien by attachment or otherwise on this personal property.

2. That the $45,000.00, which the attacking creditors secured for themselves should have been given to the Receiver in the Receivership suit to distribute about 99% thereof to the American Water Works and Electric Company and the other allies of the Equitable Trust Company, who have at all times hindered and obstructed the attacking creditors, and also in order that the Equitable Trust Company may share pro rata in this fund with whatever deficiency judgment it may perhaps obtain at some distant day in the future. The basis for this last contention is their oft repeated, but false statement that the Receiver made the same attack upon the mortgage and deed of trust as did the attacking creditors.

We shall first discuss this second contention of appellant.

The Receiver had the same opportunity as did the attacking creditors to attack the deed of trust as to personal property on the ground that it lacked the affidavit of good faith required by the Idaho Statutes and that it was not filed as a chattel mortgage, but the Receiver refused and neglected to make this attack. The attorneys for these appellees, prior to the time the Receiver answered, begged the Receiver's attorney to join with them in their pleadings and to make this attack for them, but he refused to do so. The Receiver's attorney, however, stated that he felt it was his duty to call the Court's attention to the fact that the records of the debtor company showed that the bonds being sued upon had been issued as collateral only. The Receiver was in default and had no answer on file when the

trial opened. Upon our calling the Court's attention to this fact, the Court directed the Receiver and his attorney to file an answer so that the Court might be advised of the exact issues, if any, which they desired to raise. (Record, pp. 141-142.) The Receiver thereupon filed an answer on the second day of the trial. This answer is found on pages 81 and 82 of the Transcript of Record. If this Court will re-examine this answer, the Court will find that nowhere from beginning to end is the fact mentioned that the deed of trust was not filed as a chattel mortgage and nowhere in the answer is it hinted or mentioned that the mortgage lacked the affidavit of good faith required by Idaho Statutes on chattel mortgages. No hint of these defects is contained in the Receiver's answer. It is in truth strictly "neutral" as to these defects. Moreover, the Receiver in his answer admits either expressly or by failing to deny, all the vital allegations of the bill of complaint with respect to the extent and validity of the mortgage lien. For instance in paragraph Fourth of the Bill of Complaint, found on pages 10 and 11 of the transcript, it is alleged that the mortgagor "*duly* made and executed * * * its certain deed of trust * *". In and by said deed of trust said Great Shoshone and Twin Falls Water Power Company "assigned, transferred and set over" certain classes of property "and all other property, real, personal or mixed," of the debtor company "in trust * * for the equal and prorata benefit of all the holders of said bonds and coupons." This allegation is not denied by the Receiver in his answer and therefore stands admitted. The Receiver purposely failed to deny this allegation.

In Paragraph Fifth of the Bill of Complaint, found on pages 11 and 12 of the transcript, the complaint alleges: "Said

Deed of Trust was *duly* recorded in the office of the Recorder, etc." In Paragraph 1 of the Receiver's answer, found on page 81 of the Transcript, the Receiver *expressly* admits all the allegations contained in Paragraph 5 as well as other paragraphs of the Bill of Complaint.

In Paragraph 17 of the Bill of Complaint, found on pages 24 and 25 of the transcript, the complainant points out certain property which had been released from the lien of the mortgage and then alleges that "all other property * * * is subjected to the lien of said Deed of Trust." This allegation is not denied by the Receiver's answer and consequently stands admitted by the Receiver.

These appellees had theretofore denied in the answer which they previously filed all these matters, which are admitted by the Receiver's answer.

For instance in paragraph 4 of our answer on page 111 of the Transcript, we find that "These defendants deny * * * that said Great Shoshone and Twin Falls Water Power Company, *duly* made and executed * * * any deed of trust, etc.," and in paragraph 5 of our answer on page 114 of the transcript, we read that "These defendants deny * * * that said deed of trust was *duly* * * * recorded, etc.," and then in Paragraphs 23, 24, 25, 26 and 27 of our answer found on pages 124 to 129 of the transcript, we point out the special defects in the execution and recording of the deed of trust and supplemental mortgages, allege our inability to attach and in paragraph 27 of our answer, we allege: "That as to all the personal and mixed property of the said Great Shoshone and Twin Falls Water Power Company, the allowed and adjudicated

claim of these defendants is prior and paramount to the claims of complainant or its deed of trust or supplemental mortgages."

No such denials or allegations are made by the Receiver though he had been invited and requested to make such allegations and denials and was fully cognizant of the contents of our answer and might have made such allegations and denials if he had so desired.

We attacking creditors discovered and uncovered these defects in the mortgage and the property whose proceeds resulted in our obtaining this $45,000.00 fund, and we believe that the prayer of our answer found on page 129 of the transcript is fully justified, being as follows:

> "Wherefore these defendants pray * * * *
>
> 2. That the Receiver of said personal and mixed property be required to satisfy the claim of these defendants first, out of said personal and mixed property or the proceeds thereof; and that these defendants, prior to the time of sale, if necessary, on account of the claims of other creditors, be held to have the *equivalent* of a prior lien upon enough of the personal and mixed property of said Great Shoshone and Twin Falls Water Power Company to insure the payment of the claim of these defendants."

When handing down a memorandum opinion, at a time when the matter was of no particular importance, the lower Court inadvertently made the remark: "By intervening creditors and by the Receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors."

It was later called to the Court's attention that the intervening and attacking creditors alone and not the Receiver made this attack on the mortgage, and so the lower Court in denying the petition of the American Water Works and Electric Company to intervene corrected himself in this respect and said: "However that may be upon an examination of the *Receiver's Answer and the proofs*, it will be seen that they were not sufficient to justify the Court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the *existence* and status of claims were offered *only by the intervenors* and only touching *their* claims." Transcript, p. 309.

Again in the same opinion, at pp. 307-308, the Court says: "It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, *it never lifted a finger in resistance or suggested that the Receiver do so.*"

Thus again the lower Court recognized the fact that the Receiver had not lifted "a finger in resistance." The trial Court also recognized the fact and so stated that this judgment for the $45,000.00 was "entirely" the fruit of our diligence. See Transcript, p. 307.

And again, we find the Court saying in the same opinion on page 308: "It is further suggested (by the American Water Works and Electric Company) that the Receiver *might have* asserted for all creditors the rights which the Court recognized in the Intervenors."

From this last quotation, we see that the American Water Works and Electric Company when in the presence of the trial judge, who knew all the facts was only bold enough to "sug-

gest" that the Receiver "might have" made the same attack as the intervening creditors, whereas now in its petition for rehearing it brazenly proclaims "the Receiver made exactly the same defence to the mortgage as did the appellees." See p. 14, Petition for Rehearing of A. W. W. & E. Co. Such tactics on the part of appellants are unfair and calculated only to mislead and deceive this Court. The Receiver as well as the American Water Works and Electric Company stood by and saw us enter into a stipulation that the amount of the fund we were to get was only sufficient to pay our claims without intimating that they intended to make any claim on it.

As to the point that the trustee should participate in this $45,000.00 fund with a "deficiency," we would again state that even at this late date the trustee has no deficiency judgment. No such request or demand was ever made in the trial Court by the Trustee. The withholding of relief not prayed for surely cannot be reversible error.

Moreover, to allow the trustee to participate with these attacking creditors in this fund would alter the respective relative rights of the trustee and the attacking creditors as they existed at the time of the appointment of a Receiver. Contract creditors could have attached and thus secured a preference over the trustee for the bond holders in this personal property prior to Receivership proceedings. The trustee could not have attached for the reason that its claim was secured by a mortgage on real estate. In order to secure a writ of attachment in Idaho one must make an affidavit that his claim is unsecured. See Sec. 4303, Idaho Rev. Codes. In Idaho there can be but one action for the recovery of any debt or the enforcement of

any right secured by a mortgage, which must be by foreclosure. Sec. 4520, Idaho Revised Codes. In Idaho a mortgagee cannot waive his security and attach and sue upon his debt. Rein vs. Calloway, 6 Ida. 634 at 639. The trustee for the bondholder with a mortgage valid as to real estate and voidable as to personalty did not have an equal chance or right with unsecured contract creditors to be paid out of the proceeds of this personalty prior to receivership proceedings and there is nothing in the receivership proceedings that should give the trustee an advantage over us which he did not prior thereto possess. This is appellants' contention as well as our own. A receivership should not operate to alter the relation of different classes of creditors. For a discussion that touches upon this matter see Westinghouse Elec. & Mfg. Co. vs. Idaho Ry. L. & P. Co., 228 Fed. 972 at 978-979, a case arising in our own District.

In Atlantic Trust Co. vs. Dana, 128 Fed. 209, at 223-224, we find the Court saying:

> "The relation of a receiver to intervening creditors like these, is much the same as that of a mortgagee trustee to the bondholders * * * If the creditors, mindful of their interest, are dissatisfied with the manner in which he represents them in suits that are pending, they may under proper circumstances, *intervene*, and ask to be made parties so as to speak for themselves."

This was our situation exactly in the case at bar. The Receiver would make no contest for us against the mortgage grounded on the defects which we pointed out. He would not join in or adopt our pleadings nor would he attack this mortgage because of the defects the attacking creditors pointed out to him. The creation of this $45,000.00 fund was solely the

result of the diligence and efforts of the attacking creditors, and was so recognized by every one in the Court below. Therefore the attacking creditors should be first paid out of this fund.

> "The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditor's bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary."

Fairness and equity demand that a similar principle be here applied. See

Clark v. Figgins et al., 5 S. E. 643.

McDermott v. Strong, 4 John Ch. R. 687.

The other main contention made by the appellant, Equitable Trust Company, in its petition for rehearing is that these appellees should not be allowed to intervene and attack the mortgage because they had no lien on the property involved.

Why must we have a lien? The statute does not say we must have a lien, nor does the statute say that a chattel mortgage without an affidavit of good faith is valid as against all creditors, excepting those who have a lien.

It is true that, ordinarily, would-be intervening creditors must show a certain interest in the matters in litigation before

they are allowed to intervene and make a contest in the proceedings pending. Ordinarily, that interest is shown by a lien upon the property which is the direct subject of litigation, but as pointed out in Potlatch Lumber Co. vs. Runkel, 16 Idaho 192, at 197, this is a matter of procedure only and does not affect the rights of property and if it is impossible to follow ordinary modes of procedure, this is a sufficient excuse for not following them.

According to Pittock vs. Pittock, 15 Idaho 47, at pp. 54-55, the fact that the would-be intervenors distributive share in property would be affected by the outcome of the pending suit, is sufficient to support a petition in intervention.

This court has so correctly interpreted the Idaho decisions dealing with the "interest" necessary to permit intervention and an attack upon a voidable chattel mortgage in Idaho that it would seem unnecessary to add to the Court's opinion.

The Equitable Trust Company in its petition for rehearing discusses the case of Neustadter Bros. vs. Doust, 13 Ida. 617, and concludes its discussion on page 22 of its petition with an italicized quotation from the opinion of the Idaho Court in that case reading as follows:

> "If the plaintiff conceived that this mortgage was absolutely void or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, *he had* an *ample, plain* and *speedy remedy at law by attachment.*"

Of course, we did not have the privilege of that remedy in the case at bar because our hands were tied by the Receivership proceedings. Consequently, the foregoing reason has no application in the case at bar. Every opinion must be construed

with reference to the facts that were before the Court for decision.

The appellants do not like the doctrine of the Idaho Supreme Court in Union Trust etc. Bk. vs. Idaho S. & R. Co., 24 Idaho 735. The fact cannot be disputed that the mortgage or trust deed in the Union Trust Bank case, *supra,* covered all the property of the corporation real and *personal* (See page 742 of opinion in above case) just as did the deed of trust in the case at bar. By reading the preface of the Court's opinion in the foregoing case setting forth the points raised by respective counsel, it will be seen that practically all the points were raised as are raised by appellants in this case.

As authority supporting our right to intervene see also Hollins vs. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. ed. 1113.

In Ruggles vs. Cannedy, 127 Cal. 290 there was presented a situation very similar to the case at bar and the same argument was made by the losing attorneys in that case as is here made by appellants. On page 292 of that case we find the losing appellant contending "No creditor who has not acquired a specific interest or lien can avoid an unified chattel mortgage."

The California Supreme Court pointed out that there were exceptions to the general rule that a lien is required and said in its opinion beginning at page 299:

> "But it is insisted that, even if an unrecorded mortgage is void at the instance of creditors, only those creditors may take advantage of the law who by judgment and execution levy, or at least by attachment levy, have acquired

> a lien upon the property before recordation * * * * * * Of course, it is true *in general* that a creditor at large of the mortgagor cannot set aside a mortgage for lack of recordation, any more than can such a creditor set aside a sale void for want of immediate delivery. He must come first with his judgment lien, execution levy, attachment or some other process or right by which he has acquired a specific interest in or claim upon the particular property. * * * * In this case the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment, by force of the insolvency act itself, they were prevented from resorting to any proceedings in law or equity for such purpose. They were limited to the presentation of claims in the insolvency Court. This they did and when these claims were allowed and approved the questions involved in them became *res adjudicata*. The presentation, allowance and approved of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the *equivalent* of a judgment."

The California Court further held at p. 303 *et seq* that the assignee representing

> "these creditors whose claims have been *approved* and *allowed* may institute on *their* behalf an equitable action to avoid the mortgage, an action, which but for the insolvency of the debtor, the creditors themselves unquestionably could have maintained after pressing their debts to judgment."

Appellees do not mention the foregoing case in their petitions for rehearing.

When the obtaining of a lien is rendered impossible by circumstances over which the debtor has no control the necessity

of a lien is dispensed with. Appellants fail to note that our situation brings us within an exception to the general rule. The cases cited by appellant are all correct when applied to the facts of these cases, but have no application in our case, where the reasons for the rule are lacking because of an entirely different state of facts.

In A. & E. Ann. Cases 1912, B Vol. 23, p. 1108, the author states:

> "According to many decisions it is not necessary that the creditor shall have a specific lien on the property before he may assail the validity of an unrecorded mortgage."

The author then cites cases from many different states and to those decisions we respectfully refer this Court.

If the rule contended for by appellees be not adopted it would be possible to have a situation as follows: At the suggestion and with the encouragement of the trustee for the bondholders, a general creditor could bring such a suit as Guy I. Towle brought, and secure the appointment of a receiver, and the property having thus been placed in *custodia leges*, other general creditors would be prevented from acquiring specific lien thereon through the levy of an attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee taking advantage of their disability could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in the mortgage.

On pages 110-115 of our original brief filed in this Court, we set forth the many reasons why the trial Court was right in refusing to allow the American Water Works and Electric Company to intervene and take from us practically all the results of the contest waged by us. The same reasons apply to the other electric companies that have allied themselves with the Equitable Trust Company. The original opinion of this Court is so clear on this phase of the appeal that we cannot believe that any further argument is desired in this connection. Therefore, we will content ourselves by referring simply to the reasons given in our original brief as above pointed out and to the reasons given by this appellate Court in its opinion.

In conclusion, urging this Court to affirm the judgment of the lower Court, we would say that this appellate Court was entirely correct in its quotation from Judge Dietrich's opinion that the judgment by which this $45,000 fund was obtained "is entirely the result of their (attacking creditors) diligence," and due in no degree whatever to any efforts put forth by the Receiver. Therefore in equity, the attacking creditors should be first paid out of this fund. And secondly, that though it is ordinarily necessary to have a lien before attacking a chattel mortgage, yet the circumstances of this case bring us within a well recognized exception to the general rule.

Respectfully submitted,

MARTIN & CAMERON,
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Solicitors for L. M Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.